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EX PARTE OR LATE FILED

May 8, 2000

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket. No. 96-98

Dear Ms. Salas:

Today, Mr. E. Shakin, representing Bell Atlantic, had a telephone conversation with Ms. D. Weiner of the Office of the General Counsel. The discussion focused on the Commission's legal authority for clarifying and continuing the terms of the Commission's Supplemental Order issued November 24, 1999 in the above referenced proceeding. The attached paper summarizes the points made by the Bell Atlantic representative.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

Susanne Guyer

Attachment

cc: D. Weiner

The Narrow Limitations on the Availability of Unbundled Network Element Combinations at Issue Here are Consistent with the Act

Narrow limitations on the availability of combinations of unbundled loops and transport such as those at issue here are unquestionably consistent with the terms of the Act, and the Commission should so find.[1]

1. In the wake of the Supreme Court's *Iowa Utilities* decision, the Commission is required to apply the "necessary and "impair" standards set out in Section 251(d)(2) of the Act in order to determine what elements (or combinations of elements) should be made available. Consistent with the Supreme Court requirements, the Commission has squarely held that this analysis is both service-specific and particular to different customer classes.

a. The Act and the Supreme Court. Section 251(d)(2) itself makes clear that the impairment analysis is service-specific:

> -- In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider at a minimum, whether . . . the failure to provide access to such network element would impair the ability of the telecommunications *carrier seeking access* to provide *the services that it seeks to offer*." (emphasis added)

Consistent with that language, the Supreme Court likewise noted that the Act requires the Commission to consider whether lack of access to a particular element would impair "the entrant's ability to furnish its desired services." *AT&T v. Iowa Utilities Board*, 119 S. Ct. 721, 735 (1999).

b. UNE Remand Order. In its decision on remand from the Supreme Court, the Commission expressly found that the impairment analysis is both service and customer segment-specific:

> -- "Section 251(d)(2)(B) requires us to consider whether lack of access to the incumbent LEC's network elements would impair the ability of the carrier to provide the *services* it seeks to offer." (emphasis in original) Para 81.
>
> -- Precisely because "[d]ifferent types of customers use

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[1] This is true both with respect to the limitations endorsed in the Supplemental Order, and as those limitations would be clarified under the terms of the Joint *Ex Parte* filed by a cross-section of the industry including both incumbents and new entrants. *See* February 29, 2000 *ex parte* letter, filed by Intermedia Communications, Time Warner Telecom, Focal Communications, Winstar Communications, Bell Atlantic, BellSouth, GTE, SBC, and US West ("Joint *Ex Parte*").

different *services* (e.g., large business customers order different services rather than residential customers)," the Commission also concluded "that it is appropriate for us to consider the particular types of *customers* that the carrier seeks to serve." (emphasis added) *Id.*

c. Line Sharing Order. In its line sharing order, the Commission relied on a service-specific analysis as the basis for imposing a line sharing requirement:

> -- "Section 251 requires incumbent LECs to provide unbundled access to a network element where lack of access impairs the ability of the requesting carrier to provide the *services* that it seeks to offer. In the Local Competition Third Report and Order, we found that it is appropriate to consider the *specific services* and *customer classes* a requesting carrier seeks to serve when considering whether to unbundle a network element. In general, competitive LECs seeking access to the unbundled high frequency portion of the loop only seek to offer voice-compatible xDSL-based services. We thus ask whether such carriers are impaired in their ability to offer *such services* without access to this network element." (emphasis added) Para. 31.
>
> -- "To conclude otherwise would be to ignore the statutory directive in section 251(d)(2) that requires the Commission to consider whether a requesting carrier is impaired 'to provide the *services* that it seeks to offer.'" (emphasis added) Para. 49.[2]

2. In order to determine whether the requesting carriers would be impaired in their ability to provide particular services or serve particular customer segments, the Supreme Court in its *Iowa Utilities* decision held that the Commission must look to the availability of competitive alternatives outside the LEC's own network. Because special access services are already widely available through alternative sources (including self-supply by the long distance carriers), carriers are not impaired if they cannot get combinations of network elements solely to substitute for special access.

a. The Supreme Court. One of the reasons that the Court remanded the unbundling issue back to the Commission was the requirement that the FCC consider alternative sources:

> -- "The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network.

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[2] See also Para 33 ("As discussed below, this situation materially diminishes the competitive LEC's ability to provide the *particular type of* x-DSL-based *service* that it seeks to offer." (emphasis added)); Para. 44 ("We believe that if competitive LECs were to provide voice service in addition to xDSL-based service, they would be impaired in their ability to provide *the data services* they seek to offer." (emphasis added)).

That failing alone would require the Commission's rule to be set aside." *Iowa Utilities Board,* 119 S. Ct. at 735.

b. Market Facts. The current record shows that there are numerous alternatives to elements of the incumbents' networks that carriers already are using for special access services. As demonstrated in the Special Access Fact Report filed with USTA's comments, competition for these services predates the Act and has experienced significant growth in recent years (without the use of UNE combinations):

> -- New Paradigm estimates that, in 1999, CLECs will earn nearly $5.7 billion from providing special access/private line service – about 52 percent of the amount the Bell companies and GTE will earn. (footnotes and citations omitted) Special Access Fact Report at 6 based on FCC data and New Paradigm Resources fact report.
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> -- CLECs' market share of the total special access/private line market in 1999 will be roughly 33 percent – about as high as MCI WorldCom's and Sprint's combined share of the long-distance market. (footnotes and citations omitted) *Id.*

3. The narrow limitations on the availability of unbundled network element combinations permitted by the Supplemental Order (and as clarified by the Joint *Ex Parte*) are consistent with service-specific analysis required by the standards in the Act.

a. The limitations at issue here would allow requesting carriers to obtain existing combinations of loops and transport for purposes of providing competing local service. They would limit the availability of those element only where carriers sought to use them to substitute for already competitive special access services. Given the level of special access competition without the use of such combinations, the Commission should conclude that competing carriers are *not impaired* where there is not significant local usage.

b. At a minimum, however, the Commission should recognize that – based on the current record – it does not have the facts to conclude that carriers *are impaired* for non-local use of UNE loop and transport combinations. Such a conclusion would support extending the current restrictions (as clarified by the Joint *Ex Parte*) to allow time for further market facts to develop.

c. Such a determination based on the record now would not prejudge a subsequent review based on a fuller record. Of course any subsequent review also could take into account the significant changes in access rates and universal service now being considered under the CALLS plan.